United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,855

ROBERT R. DIX,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

6888

Appeal From the United States District Court for the District of Columbia

WILLIAM J. GARBER
412 Fifth Street, N.W.
Washington, D.C.

Counsel for Appellant

QUESTIONS PRESENTED

1. Whether, in a case of housebreaking and assault, where the identification of appellant was of an equivocal nature, it was error for the Trial Court to allow statements made by the complaining witness of an accusatory nature to go to the jury, where there is no claim that appellant remained silent or failed to deny the same.

2. Whether, where an indictment charges the housebreaking into premises of a person named in the indictment, it was error for the Trial Court to overrule a motion for judgment of acquittal where the Government fails to put the named person on the witness stand as part of its proof.

3. Whether an instruction to the jury on the element of flight is insufficient and erroneous which instructs that flight while not necessarily reflecting feeling of guilt is a circumstance which the jury may consider as tending to show feelings of guilt and the jury may, but is not required to consider these feelings of guilt as evidence tending to show actual guilt.

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Appeal From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the defendant, Robert R. Dix, in the Court below, from a judgment of conviction. (J.A. 2-3), by a jury on the charge of Housebreaking and Simple Assault. (J.A. 1-2). The District Court below had jurisdiction by virtue of Title 11, Sections 305 and 306 of the District of Columbia Code, 1961 Edition, as amended. The jurisdiction of this Court is conferred by virtue of the provisions of Title 28, Section 1291 of the United States Code.

STATEMENT OF THE CASE

The Appellant was charged in a three count indictment for housebreaking and Assault with a dangerous weapon. (J.A. 1-2) He was tried by a jury on two of the Counts, the first Count having been dismissed prior to trial. He was convicted of Housebreaking and the lesser included offense of Simple Assault on the third count. (J.A. 2-3)

The complainant, Diane Lombardo, testified that on February 13, 1964, at 4313 Wheeler Road, S. E., Washington, D.C., where she lived with her mother and two sisters, she had been baby sitting for neighbors from eight o'clock until about quarter to ten in the evening. (Tr. 5,6). She came downstairs to the apartment where she lived, stayed for about five or ten minutes and then went to a nearby store to buy school supplies, staying at the store for about five minutes. (Tr. 7). The store was about a block from the apartment house. (Tr. 8). As she walked toward her home she observed a man walking toward her at a regular pace. (Tr. 8).

After she turned into the apartment building, she observed the man enter the building behind her. She entered her apartment and attempted to shut the door, but couldn't because of a man's hand. (Tr. 16). She jumped back and saw a man's hat and moustache. He put his arm around her shoulders to keep her from running and came in. The complainant started to scream. (Tr. 17). She also noticed a shiny object in his hand. (Tr. 19).

The complainant testified that the man wore all dark clothing. (Tr. 21). His hat covered his eyes with the shadow and she saw a moustache. (Tr.22). She identified the appellant in the Courtroom as the same man who came into the apartment in spite of her prior description. (Tr. 23).

After the man ran out of the apartment, the complainant testified that about twenty minutes later, he was brought back to the apartment

with a group of policemen. (Tr. 23). Over objection, the complainant was permitted to testify that when a policeman asked her if that was the man (Tr. 25), she said: "That's him." (Tr. 27).

The sister of the complainant, Deborah Lombardo, testified that her sister, Diane, returned from babysitting about nine-thirty or a quarter to ten, stayed in the apartment about ten minutes, or so, and left again. (Tr.90). She returned a bit later, because she forgot something (Tr. 91), saying she would be right back. The witness then testified that a man came to the door asking for a strange name and if her mother was home. (Tr. 91). The man left. The witness testified that while she was in her bedroom, her sister started to come in and started screaming. (Tr. 92). She saw a shadow against the wall with a man with a hat on. (Tr. 93). Her sister kept screaming and when she ran into the living room, only the sister was there. (Tr. 93).

When the witness was asked whether she recognized the man came to the door while her sister was out, she stated that she thought it looked like the appellant. (Tr. 95, 96).

The next witness, Patrick O'Neill, testified that his apartment was directly opposite the Lombardo apartment. (Tr. 122). About ten or ten fifteen or so, he had just concluded a long distance call when he heard screaming. (Tr. 122, 123). He opened the door of the apartment and stepped into the hall. (Tr. 123). He said he encountered the appellant. (Tr. 123). The subject went through the set of doors of the apartment and he followed him. The doors swung back and O'Neill put his hand through the glass. (Tr. 124). He followed him down to the sidewalk, struggled, subject broke free, ran with O'Neill in pursuit, O'Neill tackled him and held him until he was aided by another individual who came on the scene. (Tr. 124).

The next witness, Kenneth Boyd, testified that he was in an apartment upstairs from the Lombardo apartment and upon hearing a scream went downstairs with a Benjamin Robles to see what was wrong. (Tr.

143). He saw O'Neill chasing a man out of the building. (Tr. 143). He testified that he was the man who grabbed the subject and held him until the police arrived. (Tr. 146).

The police officer, Ronald Clarke, testified that he was a block away from 4313 Wheeler Road, S.E., when he received a call in the scout car in which he was riding to investigate trouble. He received the call at 10:22 p.m. (Tr. 166). He arrived on the scene and found the witness Boyd holding a man wearing a dark overcoat. (Tr. 167).

During the course of talking with the appellant, whom he identified as the man being held by Boyd (Tr. 168), the appellant stated that he did not know what it was all about, that he had been walking on Wheeler Road and while passing by the apartment building he was jumped by several men. (Tr. 170).

Over objection, the officer was permitted to testify as to a conversation with Diane Lombardo as to the events and her identification of the appellant. (Tr. 171-175).

The Government rested with these four witnesses and defense motions for judgment of acquittal were denied. (Tr. 192-194).

The first witness for the defense, was Colonel P. N. Jensen, who testified that on February 13, 1964, he was lecturer at the University of Maryland on the campus at College Park. (Tr. 197, 198). He testified that appellant was a student in the class on that evening which began at 7:00 o'clock and didn't get out until maybe nine-forty-five, but not much before 10. (Tr. 198). The witness had a seating chart which indicated appellant's name. (Tr. 199, 200). Based on this record, appellant was in attendance when the class adjourned at approximately quarter to ten. (Tr. 201).

After the testimony of appellant's wife, appellant rested and renewed motion for judgment of acquittal was denied. (Tr. 210).

STATUTES INVOLVED

Title 22, Section 1801, District of Columbia Code, 1961 Edition, as amended, defines "Housebreaking" as follows:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, Section 502, District of Columbia Code, 1961 Edition, as amended, provides as follows for assault with dangerous weapon:

> Every person convicted of. . .an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, Section 504, District of Columbia Code, 1961 Edition, as amended, provides as follows for simple assault:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

STATEMENT OF POINTS

1. The Lower Court erred in admitting the testimony of the complaining witness as to the identification of the appellant, in appellant's presence and after the alleged incident.

2. The Lower Court erred in admitting the testimony of a police

officer as to statements made by the complaining witness, in appellant's presence, accusing appellant of an alleged housebreaking and assault, where there is no contention as to an admission by appellant.

3. The Lower Court erred in denying appellant's motions for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of the entire case.

4. The Lower Court erred in instructing the jury on the element of "flight" in its charge to the jury.

SUMMARY OF ARGUMENT

1. The appellant contends that the Trial Court erroneously admitted into evidence the testimony of the complaining witness as to her identification of appellant to the police officer and the police officer's testimony as to the account given by the complaining witness in appellant's presence. Appellant maintains that this was prejudicial there being no contention that there was a direct or implied admission by the appellant. Due to the equivocal nature of complainant's identification of appellant, her account, as an accusatory statement, was prejudicial error.

2. It is the contention of appellant that where the indictment alleged that the entry was made into the apartment of "Margaret Lombardo" it was error to deny the motion for judgment of acquittal where the testimony of "Margaret Lombardo" was not in evidence. Appellant contends that this was part of the Government's proof, to wit: the proprietary or possessary interest of "Margaret Lombardo" in the premises allegedly entered.

3. It is the contention of appellant that the Court's instruction to the jury on the element of "flight" was insufficient and overemphasized flight as an indication of feelings of guilt. That more full and complete instruction should have been given, as suggested by counsel, in following the language in *Wong Sun v. United States*, 371 U.S. 471.

ARGUMENT

1. *The Lower Court Erred in Admitting the Testimony of the Complaining Witness and the Police Officer as to Accusatory Statements.*

Points 1. and 2. are consolidated for the purpose of argument as the same principle is involved, to wit: the admissibility of accusatory statements by the complaining witness and the police officer as to the account given by the complaining witness after the alleged incident. (Tr. 25, 27).

The Government did not contend, in the Court below, that they would show an implied admission, or that appellant remained silent. (Tr. 173). Appellant contends that the testimony of the complaining witness as to her identification of appellant shortly after the incident and the officer's testimony as to the account given by the complaining witness was erroneously received.

In the case of *Kelley v. United States* (USCA DC 1956) 99 U.S. App. D.C. 13, 236 F.2d 746, we find the following:

> "The general principle applicable to this type of evidence is that an accusatory statement and the defendant's failure to deny it are admissible only if the circumstances are such 'as would warrant the inference that he would naturally have contradicted (it) if he did not assent to (its) truth' . . ."

As pointed out above, there is no contention that appellant remained silent or did not deny the accusations. The Court, in the *Kelley* case, *supra,* did not have to reach the question of silence or failure to deny, but cited cases where the mere fact of arrest was sufficient to render a statement made in the presence of a prisoner inadmissible.

In the instant case, the complaining witness testified directly from the witness stand concerning the event of the alleged crime. She made her identification of the appellant in open Court. Cross-examination rendered her identification equivocal, to say the least.

Appellant reads the *Kelley* case, *supra,* as standing for the proposition that accusatory statements made in the presence of a defendant are inadmissible unless the Government can show a direct or implied admission. Otherwise, they are hearsay. Also *Pinkard v. United States,* 99 U.S. App. D.C. 394, 240 F.2d 632.

The ability of the complaining witness to identify appellant as the culprit was the crucial issue in this case. Appellant submits that it was prejudicial error for the Court to have allowed her accusatory statements to have been admitted into evidence. It was merely an effort to buttress what was an equivocal identification of the appellant.

2. *The Lower Court Erred in Denying Appellant's Motions for Acquittal for Failure of the Government To Adduce the Testimony of Margaret Lombardo as to Her Possessory or Proprietary Interest in the Premises.*

In the instant case, the indictment charged the appellant with entering the apartment of "Margaret Lombardo". The Government failed to put Margaret Lombardo on the stand to testify as to her possessory or proprietary interest in the premises allegedly entered, nor was other evidence introduced to show such interest in Margaret Lombardo.

In the case of *Bord v. United States,* 76 U.S. App. D.C. 205, 133 F.2d 313, citing *Cady v. United States,* 54 App. D.C. 10, 293 F.829, the Court said:

> " 'The purpose of the law in requiring the name of person who occupied and used the building entered to be stated is to negative the defendant's right to break and enter, and to protect him from a second prosecution for the same offense.' . ."

In *Bord, supra,* there was a question of proof of corporate identity, which a majority of the Court held was satisfied by the evidence and in *Cady, supra,* the indictment alleged occupancy and use by one person, the evidence showing permission by such person to another for co-occupancy and co-use.

In the instant case, appellant contends that there was no proof as to the occupancy or use by the named person, "Margaret Lombardo". The complaining witness testified that the apartment was lived in by herself, her two sisters and mother. Presumably the mother was "Margaret Lombardo", but she was not called to the stand and there was no evidence as to what her possessory or proprietary interest in the premises was.

A reading of the transcript will reveal no statement by the witnesses that a person named "Margaret Lombardo" was the occupant of the premises. None of the witnesses was asked if the apartment allegedly entered was the apartment of "Margaret Lombardo".

Appellant maintains that this was an essential element of the charge and the Government had the affirmative duty to establish it by the evidence, which was not done in this case.

3. *The Lower Court Erred in Its Instruction as to the Element of Flight.*

During its charge to the jury, the Court charged on the element of flight in the following language: (Tr. 222-223)

> "In this case, evidence has been offered tending to show flight of the Defendant from the scene of the alleged crimes. This evidence may be considered in connection with the other evidence in the case. Where evidence is offered tending to show defendant's flight, that is, that he went away from the scene of the alleged offense, it will be for you to say whether or not it was a flight, as a matter of fact.
>
> "You would have to determine from the evidence whether it was a flight or not, and then you would consider such evidence in the light of all the other evidence in the case, giving each part such weight as you think it entitled to receive.

> "Flight does not necessarily reflect a feeling of guilt, and feelings of guilt which are present in many innocent people do not reflect actual guilt. In this case, if you find that in fact the Defendant did flee from the scene, while you are not to presume guilt from the flight, you have a right but you are not required to consider the Defendant's flight as one circumstance tending to show feelings of guilt, and you may but you are not required to consider these feelings of guilt as evidence tending to show actual guilt."

Appellant contends that this charge overemphasized the feelings of guilt factor. Appellant requested the Court to charge the jury in the language quoted by *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d. 441. (Tr. 208).

In that case, the Supreme Court pointed out in footnote 10, on page 483 of 371 U.S. reports that the Court had consistently doubted the probative value of flight in criminal trials.

The Court then quoted from *Alberty v. United States*, 162 U.S. 499, 511:

> ". . . it is not universally true that a man who is conscious that he had done wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' . ."

The Court, in its charge in the instant case, emphasized the feelings of guilt factor without taking into account that flight does not always involve feelings of guilt or actual guilt.

Certainly it cannot be said that flight to avoid being charged as defendants or unwillingness to appear as witnesses has any bearing or relationship to guilty feelings.

In *Miller v. United States*, 116 U.S. App. D.C. 45, 320 F.2d 767 this Court quoting further from *Alberty v. United States, supra*, pointed out:

> ". . .Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

It is evident, therefore, that feelings of guilt are not the only factors in the element of flight, but fear of involvement is also a factor and that a complete flight instruction should contain reference to this latter factor.

It is submitted, therefore, that in view of the entire record, especially the equivocal eye witness testimony, that the remark of the Government witness was sufficiently prejudicial to compel a mistrial in the case as to appellant and that the error was not cured by the admonition given to the jury by the Court.

CONCLUSION

In consideration of the premises hereinabove considered, the Judgment of the Lower Court should be reversed.

Respectfully submitted,

WILLIAM J. GARBER

412 Fifth Street, N.W.
Washington, D.C.

Counsel for Appellant

APPENDIX

RELEVANT DOCKET ENTRIES

1964

March 24	Presentment and Indictment filed (3 counts)
March 27	Arraigned, Plea Not Guilty entered. Appearance of William J. Garber entered and filed. Robinson, J.
April 15	Motion of Defendant to dismiss, filed.
May 1	Motion of Defendant to dismiss heard, argued and the Court having ruled that the Government should elect as to which of the counts they intend to proceed on for trial by 10:00 a.m., Monday, May 4, 1964. Attorney William J. Garber present. Tamm, J.
May 4	Oral motion of Government to dismissal of Count One, Granted. Attorney not present. Tamm, J.
June 8-10	Trial, McGarraghy, J., and a jury. Verdict: Guilty on Count II as indicted and Guilty of Simple Assault under Count III. Attorney William Garber present. McGarraghy, J.
July 2	Sentenced to imprisonment for a period of Three (3) Years to Nine (9) Years on Count 2; One (1) Year on Count 3; said sentence by the Counts to run Concurrently. Bond pending appeal set at $3,000.00; Attorney William J. Garber present.
July 6	Judgment of Commitment of 7-2-64, filed. McGarraghy J.
July 10	Notice of Appeal, filed.

INDICTMENT

The Grand Jury charges:

On or about February 13, 1964, within the District of Columbia, Robert R. Dix entered the apartment of Margaret Lombardo, with intent to steal property of another.

SECOND COUNT:

On or about February 13, 1964, within the District of Columbia, Robert R. Dix entered the apartment of Margaret Lombardo, with intent to commit an assault.

THIRD COUNT:

On or about February 13, 1964, within the District of Columbia, Robert R. Dix made an assault on Diane M. Lombardo with a dangerous weapon, that is, a knife.

/d/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Foreman

JUDGMENT AND COMMITMENT

On this 2nd day of July , 1964 came the attorney for the government and the defendant appeared in person and by counsel, William J. Garber, Esquire,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Housebreaking and Simple Assault

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Three (3) years to Nine (9) Years on Count Two;

One (1) year on Count Three, said sentences by the Counts to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joseph C. McGarraghy
United States District Judge

NOTICE OF APPEAL

Name and address of appellant

Robert R. Dix, 12019 Centerhill Street, Wheaton, Maryland

Name and address of appellant's attorney

William J. Garber, 412 Fifth St. N.W., Washington, D.C.

Offense

Housebreaking & Simple Assault

Concise statement of judgment or order, giving date, and any sentence

July 2, 1964; Judgment Guilty, Sentenced to three (3) to nine (9) years on housebreaking charge and one (1) years on simple assault charge.

Name of institution where now confined, if not on bail

On bail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

July 10, 1964 /s/ Robert R. Dix, Appellant

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,855

ROBERT R. DIX, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Was it harmless error to allow the complaining witness and a police officer to testify about the complainant's prior identification of appellant when the complainant identified him at the trial, was subject to cross-examination, the issue of identification was fully "ventilated" by defense counsel and when appellant was apprehended by a former F.B.I. agent as he fled from the scene?

2. Was the court's flight instruction erroneous when it informed the jury that flight does not necessarily reflect a feeling of guilt, and feelings of guilt which are present in many innocent people do not necessarily reflect actual guilt?

3. Was there a fatal variance when the housebreaking count of the indictment alleged that appellant entered the apartment of Margaret Lombardo and the proof showed that he entered the apartment of Mrs. Lombardo?

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No. 18,855

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged with two acts of housebreaking (22 D.C. Code § 1801) and assault with a dangerous weapon (22 D.C. Code § 502) in a three count indictment filed March 24, 1964. On May 4, 1964 one count of housebreaking was dismissed by the District Court on oral motion of the Government. On June 8, 1964 appellant was tried to a jury and subsequently convicted of housebreaking and simple assault. He was sentenced to imprisonment for a term of three to nine years for the felony and one year for assault, the sentences to run concurrently. Appellant is presently on bond pending appeal.

The testimony showed that Diane Lombardo, age 14, of 4313 Wheeler Road, Southeast in the District of Columbia, was returning home from a grocery errand at approximately 10:00 p.m., February 13, 1964 (Tr. 4, 5-7, 35). She lived in an apartment at that address with her mother and two younger sisters (Tr. 5). She observed that a man had followed her into the apartment building. After she had opened her apartment door and stepped inside, closing of the door was prevented by a man's hand (Tr. 10, 16). Diane jumped back observing the man's face, particularly his mustache. He seized the girl and told her to stop screaming (Tr. 17). She saw a shiny object in his hand (Tr. 19). An open pocket knife was later found on the floor of the apartment (Tr. 28, 29). After her sister Debby also began to scream the man abruptly left the apartment (Tr. 20). The witness identified appellant as the intruder that night, although he was clean shaven and wore glasses at the trial. About twenty-five minutes after the housebreaking and assault, at a time when Mrs. Lombardo had returned home, appellant was brought back to the apartment by the police (Tr. 23, 56-57). Over objection the witness was allowed to testify that she then identified Dix as her assailant. She also testified that this was in fact the same man who had sought entry earlier (Tr. 26-27). The girl had never seen appellant before, nor did he have permission to enter the apartment (Tr. 35, 36).

On cross-examination defense counsel elicited the facts that Diane was upset when appellant was returned to the apartment and could not now remember whether or not she was at first unable to identify Dix (Tr. 58-59, see Tr. 75, 78). It was further established that the witness again saw Dix the next day, February 14, 1964 at the D.C. Court of General Sessions (Tr. 67).

On re-direct examination Diane admitted that she had a slight doubt whether or not appellant was her assailant (Tr. 77).

Debby Lombardo, age 11, testified that after Diane left for the grocery store, a man came to the door and asked

for a person unknown to her. In response to his further question she advised him that her mother was not at home but that her sister would shortly return. He then left (Tr. 91). As Diane came in the door, Debby heard her scream, and observed a man's shadow against the wall. He was gone by the time she emerged from the bedroom.

She testified that the man returned by the police that evening was the man who had made the earlier inquiry (Tr. 98, 115). She also pointed out Dix in the courtroom as that individual (Tr. 95, 116). She had some hesitancy in the trial identification because of the absence of his mustache and the presence of eyeglasses (Tr. 96).

Patrick O'Neill, a former F.B.I. agent, testified that he occupied the apartment opposite to that of the Lombardo family. About 10:15 p.m., on the evening in question, he heard a scream outside his apartment (Tr. 121-23). Upon opening his door he saw Dix inside the Lombardo apartment (Tr. 123). Appellant fled down the stairs and through the swinging doors of the building with O'Neill in pursuit; the latter gashing his hand on the door as it swung back. Once on the street O'Neill tackled him, there was a brief struggle and Dix broke free running about 15 feet. O'Neill tackled him again maintaining the arrest until aid came (Tr. 124).

A portion of O'Neill's direct examination is as follows:

> "Q. He was actually inside the Lombardo apartment, is that right?
>
> A. Definitely, yes.
>
> Q. Now, as you chased him, did you ever lose sight of him at all at any time?
>
> A. No. I was no more than three feet behind him at any time." (Tr. 124-25)

The witness positively identified appellant as the man he had apprehended (Tr. 125). In the squad car on the way to the hospital to obtain aid for O'Neill's cut, Dix remarked to him, "Ah, I hope you bleed to death." (Tr. 129).

Kenneth Boyd, age 17, testified that while visiting his sister with a friend, one Benjamin Robles, a scream was heard.

> "A. My sister, Benjamin and myself were watching TV when I heard this scream. Naturally, me and Benjy went downstairs to investigate and see what was wrong. At the time I seen this man, Dix, and Pat [O'Neill] running down the steps. Pat was chasing this man . . . ." (Tr. 143).

After observing O'Neill subdue Dix, the witness went over and held appellant until the police arrived (Tr. 146).

Police Officer Ronald Clarke testified that he arrested Dix (Tr. 168). He returned appellant to the Lombardo apartment and testified over objection that Diane Lombardo identified Dix as the intruder (Tr. 175). Officer Clarke also recovered an open pen knife from the floor which he identified as Government's Exhibit No. 1 (Tr. 176). On cross-examination he indicated that Diane, when first confronted with Dix, said she wasn't sure whether this was the man or not. She only identified him as such when questioned a second time (Tr. 186).

Appellant did not testify.

Retired Colonel Carl P. N. Jensen testified that on the evening in question, appellant had attended the first of a lecture series he was giving at the University of Maryland and that the class was released at about 9:45 p.m. (Tr. 197-99) (The nature of the class was not revealed).

Appellant's wife testified that she had never seen the penknife in evidence nor had she ever known her husband to carry a knife (Tr. 205).

The jury promptly returned its guilty verdict (Tr. 231).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous

weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Rule 52(a) Federal Rules of Criminal Procedure provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

Testimony by the complaining witness and a police officer concerning the complainant's prior identification of appellant as her assailant was harmless error where the complainant testified at the trial, was thoroughly cross-examined and her inability to initially identify appellant was demonstrated to the jury. "Ventilation" of the iden-

tification issue coupled with the overwhelming proof of appellant's guilt clearly supports this conclusion.

The court did not err in instructing the jury on the weight to be accorded appellant's flight when it charged that flight does not always reflect a feeling of guilt and that actual guilt feelings may be present in innocent people and are thus not always reflective of actual guilt.

There was no violation of any substantial rights of appellant by the variance between the name Margaret Lombardo as alleged in the indictment and proof at trial that the apartment entered belonged to a Mrs. Lombardo, when he claimed neither surprise nor prejudice at trial and when he is protected against further prosecution for the same offense. Accordingly, this variance is to be disregarded under Rule 52(a) of the Federal Rules of Criminal Procedure.

ARGUMENT

I. Hearsay testimony of the complainant's prior identification of appellant was harmless error in the circumstances of this case.

(See Tr. 26, 126, 175, 186-187)

As appellant correctly observes, the Government did not seek to introduce his prior identification by the complaining witness on the theory of an implied admission by silence (Br. 7). That theory was specifically rejected by the prosecuting attorney (Tr. 26, 173-74) and we may infer that it was not argued to the jury. Cf. *Naples* v. *United States*, —— U.S. App. D.C. —— (No. 18,186, November 9, 1964). Diane Lombardo's testimony of her prior identification of appellant was admitted on the theory of corroboration (Tr. 26), and even if hearsay,[1] it was harmless in the circumstances of this case. Cross-examination of the girl indicated her inability to remember whether or not she was initially unable to positively

[1] There was no limiting instruction given by the court nor was one requested.

identify Dix when he was returned by the police on the evening of the crime. That she in fact could not at first identify him was testified to by Officer Clarke along with the fact that Diane only identified Dix after a second inquiry (Tr. 186-87). Also before the jury was appellant's disclaimer of guilt when apprehended by Mr. O'Neill (Tr. 126). This "ventilation" of the indentification issue greatly attenuated the thrust of her extra-judicial remark. It was further paled into insignificance by her valid testimony to the effect that the man returned by the police was in fact her assailant twenty-five minutes earlier. This statement coupled with Officer Clarke's testimony that Dix was the man he returned to the apartment, was for all practical purposes not very different from her testimony of the prior contemporaneous identification.

Officer Clarke's subsequent testimony of Diane Lombardo's identification of Dix on the evening of February 13 (Tr. 175) was merely cumulative to her own testimony and hardly calls for reversal. *Baber* v. *United States*, 116 U.S. App. D.C. 358, 324 F.2d 390 (1963), *cert. denied*, 376 U.S. 972 (1964); *Williams* v. *United States*, —— U.S. App. D.C. —— (No. 18,406, June 25, 1964). *Cf. Leeper* v. *United States*, 117 U.S. App. D.C. 310, 329 F.2d 878 (concurring opinion of Wright, J.), *cert. denied*, 84 SCt. 1641 (1964); *Copes* v. *United States*, —— U.S. App. D.C. —— (No. 18,131, May 21, 1964) (adhered to after reargument by order dated November 2, 1964).

This conclusion is especially valid, when one considers the circumstances of appellant's apprehension by Mr. O'Neill which are so compelling on the issue of identity as to leave no doubt of Dix's guilt.

II. The court's flight instruction was correct.

(See Tr. 222-223, 228.)

Appellant further contends that the court's instruction on flight was erroneous in that it "emphasized the feelings of guilt factor without taking into account that flight does not always involve feelings of guilt or actual

guilt." (Br. 10). In this portion of the charge the court in fact instructed:

> "Flight does not necessarily reflect a feeling of guilt, and feelings of guilt which are present in many innocent people do not necessarily reflect actual guilt. In this case, if you find that in fact the Defendant did flee from the scene, while you are not to presume guilt from the flight, you have a right but you are not required to consider the Defendant's flight as one circumstance tending to show feelings of guilt, and you may but you are not required to consider these feelings of guilt as evidence tending to show actual guilt." (Tr. 222-23).

When counsel made objection below, after the charge had concluded, the court observed:

> "My charge on flight is almost a verbatim copy of the language used by Judge Bazelon in the Miller case decided on June 14, 1963, which was after the Wong Sun case. I used his precise language as to what the charge should contain" (Tr. 228).

Indeed he had. *Miller* v. *United States*, 116 U.S. App. D.C. 45, 51, 320 F.2d 767, 773 (1963). Appellee sees no ground for complaint.

In any event, even if this portion of the charge was inadequate the error is rendered harmless by the overwhelming proof of appellant's guilt.

III. The variance between indictment and proof prejudiced no substantial rights of appellant.

(See Tr. 5, 88-89, 122-24, 130, 138, 192-93).

Appellant further contends that a failure to prove that the apartment unlawfully entered was *Margaret* Lombardo's, entitled him to a judgment of acquittal at the close of the Government's case. This claim is really one of fatal variance between indictment and proof.

The indictment alleged:

> "On or about February 13, 1964, within the District of Columbia, Robert R. Dix entered the apartment of Margaret Lombaro, with intent to commit an assault"

The proof showed that Dix, on February 13, 1964, entered apartment 102 at 4313 Wheeler Road, Southeast in the District of Columbia and assaulted Diane Lombardo. It was further shown that this was the apartment of Mrs. Lombardo. The latter fact was established by Diane Lombardo's testimony that she lived at that address with her mother and two younger sisters (Tr. 5). Similar testimony was given by her sister Debby (Tr. 88-89). Further, Mr. O'Neill testified that his apartment was opposite to the "Lombardo apartment". (Tr. 122-24, 130, 138). (Site of the housebreaking).

This variance between indictment and proof *i.e.*, omission of Mrs. Lombardo's given name, might indeed be fatal at common law. *People* v. *Smith* 341 Ill. 649, 173 N.E. 814 (1930); *Birmingham* v. *State*, 123 Cr. (Tex) 471, 59 S.W.2d 835 (1933). However, in states which have mitigated this rigor of the common law by providing for a harmless error test in assaying the effect of a variance, the disparity disclosed by the instant record would not call for reversal of the conviction. *State* v. *Nelson*, 101 Mo. 477, 14 S. W. 718 (1890); *State* v. *Wrand*, 108 Ia. 73, 78 N.W. 788 (1899).

Similarly, the instant variance is to be tested by Rule 52(a) of the Federal Rules of Criminal Procedure which provides that,

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Under that rule, the relevant inquiry is whether appellant was adequately apprised of the charges against him to enable him to prepare his defense without surprise at trial and whether he is protected against future prosecution for

the same offense. *Berger* v. *United States*, 295 U.S. 78 (1935).

Dix did not at trial, nor does he on appeal, claim surprise or prejudice as a consequence of the variance (Tr. 192-93, Br. 8-9). The objection was lodged on a merely technical basis. Such claims were meant to be obviated by Rule 52(a). *Compare Hallman* v. *United States*, 93 U.S. App. D.C. 39, 208 F.2d 825 (1953). Appellant is also protected against future jeopardy for the housebreaking he stands convicted of.

Relevant is this Court's observation in *Bord* v. *United States*, 76 U.S. App. D.C. 205, 133 F.2d 313, *cert. denied*, 317 U.S. 671 (1942)

> "We do not suggest that failure to prove the identity and corporate character of the occupant would have called for reversal. The purpose of the law in requiring the name of the person who occupied and used the building entered to be stated is to negative the defendant's right to break and enter, and to protect him from a second prosecution for the same offense. Whoever occupied the Savoy Theater, it is obvious that appellant had no right to break and enter it or to remove property from it, and it was sufficiently identified so that he cannot again be prosecuted for these offenses. (footnote omitted) 76 U.S. App. D.C. at 206, 133 F.2d at 314.

See *England* v. *United States*, 174 F.2d 466 (5th Cir. 1949); *Ferrari* v. *United States*, 169 F.2d 353 (9th Cir. 1948).

The variance herein could hardly be deemed to have affected any substantial rights of Dix and is accordingly to be disregarded.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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